

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLUMBIA
3

4 ELOUISE PEPION COBELL, et al., :
5 :
6 Plaintiffs, : Civil Action No. 96-1285
7 :
8 v. : Washington, D.C.
9 : Friday, October 1, 2004
10 SECRETARY OF THE INTERIOR, : 3:02 p.m.
11 et al., :
12 :
13 Defendants. :
14 :
15 x

16 TRANSCRIPT OF MOTIONS HEARING
17 BEFORE THE HONORABLE ROYCE C. LAMBERTH
18 UNITED STATES DISTRICT JUDGE
19

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11 202-273-0745

1 P R O C E E D I N G S

2 THE DEPUTY CLERK: In the matter Elouise Cobell, et
3 al., versus the Secretary of Interior et al, 96-1285. For the
4 plaintiff, Mr. Gingold, Mr. Harper, Mr. Guest. For the
5 defendants, Ms. Spooner, Mr. Schiffer, Mr. Jensen and Ms.
6 Krouz.

7 THE COURT: Plaintiffs may proceed.

8 MR. GINGOLD: Good afternoon, Your Honor. Thank you
9 very much for the status conference. We don't like burdening
10 the Court; however, we believe this is a very critical matter.

11 Brief history: On December 23, 2002, this Court
12 entered an order for the purposes of protecting the trust
13 beneficiaries, who were children, elderly, infirm, and
14 otherwise not considered to be competent because of the effort
15 by the government at that time to terminate their trust rights
16 in this litigation.

17 On September 29, a few days ago, 2004, this Court
18 supplemented that order in order to ensure that the sale,
19 exchange, transfer, or conversion of Indian trust land would
20 not occur unless the trust beneficiaries were provided
21 adequate information concerning their trust lands, not that
22 the sales would be prohibited. Rather, that once the
23 information was provided, they could make an informed decision
24 and, as this court noted, a principal trustee would ensure
25 that that type of information is provided.

1 Plaintiffs filed the request for an emergency status
2 conference for several reasons, one of which is because we
3 have been informed and we have confirmed information that
4 checks, in fact, were not to be provided to trust
5 beneficiaries in reaction to this court's September 29th
6 supplementary order, and the checks included Indian Land
7 Consolidation Act funds. The checks involved judgment funds.
8 The checks did not involve the sale, exchange, transfer, or
9 conversion of Indian trust land.

10 Further, in the notice that went out to the trust
11 beneficiaries, or to the government officials and Interior
12 last night, not only are communications with members of the
13 class prohibited with regard to the sale, exchange, transfer,
14 or conversion of Indian trust land, but the additional items
15 are also barred from communication.

16 As a result, based on telephone calls that Mr.
17 Harper and I have received over the last 48 hours -- or 24
18 hours, rather -- from California, to Montana, to Oklahoma, to
19 New Mexico, the trust beneficiaries are not able to speak to
20 Interior Department officials about anything whatsoever.

21 All communication with the trust beneficiaries has
22 been terminated, and it is stated by the trust beneficiaries
23 they were informed that this was the case because of this
24 Court's order. Many of them are extremely confused and
25 desperate to get information. Tribal activities have also

1 been interfered with as a result. Indeed, in Mr. Tex Hall,
2 the chairman of NCAI and the chief of his tribe, testified in
3 this trial. One of their tribal corporations, which is a beef
4 company, was scheduled to meet with an area director a couple
5 of days ago. Members of the tribe who were active in the
6 corporation traveled at great distances to meet with the area
7 director. The area director said he would not meet with them
8 because of this order. That had nothing to do with the sale
9 or transfer of individually owned Indian trust land.

10 The additional items that are prohibited explicitly
11 in the notice that went out to the Interior Department
12 officials yesterday are the following: Any discussions with
13 regard to encumbrances, leasing, lease sales, permitting,
14 rights of way, timber sales, of or on individually owned
15 Indian trust land, the investment of trust funds in IM
16 accounts, estate planning, will drafting, and the probate of
17 or relating to Indian trust assets, the surveying or appraisal
18 of trust assets, titled to trust lands, ownership of trust
19 funds or lands, and physical improvements or alterations of
20 trust assets.

21 Your Honor, this Court entered the December 23,
22 2002, order to protect the trust beneficiaries. This Court
23 entered the September 29, 2004, supplement to protect the
24 trust beneficiaries. The government is using the two orders
25 as a sword to harm the trust beneficiaries and deprive them of

1 desperately needed funds.

2 There is no conceivable basis why trust checks
3 should not be distributed promptly. As this Court noted from
4 the attached memorandum from Mr. Swimmer, he explicitly
5 identified the trust check issue as an issue. Plaintiffs
6 would also like to provide to this Court and to the defendants
7 a memorandum that was distributed by Donna Erwin yesterday
8 which further states that checks will be held.

9 As this Court will see, this is a memorandum or
10 e-mail that is dated 9/30/2004, yesterday. It's 1:26 p.m.
11 That's Albuquerque time, which means it was 3:26 eastern time.
12 It says as follows, among other things:

13 "As I have communicated to you," and this is to OST
14 employees, and it identifies them above. "Subject: Court
15 order. As I have communicated to you, we will hold per
16 capita payments, and get permission from the Court on notice
17 to be enclosed."

18 Your Honor, there was nothing in the orders that
19 justifies withholding of checks, including per capita checks
20 to the trust beneficiaries. That has nothing to do with what
21 this Court was trying to do.

22 THE COURT: I totally agree.

23 MR. GINGOLD: This is nothing but a further attempt
24 at retaliation against the trust beneficiaries. We've seen
25 this before. We saw this when the TRO was entered on December

1 5, 2001. We saw it after the consent order on December 17,
2 2001. The people who need their money the most are being
3 punished. People who have traveled hundreds and sometimes
4 over a thousand miles to go to their agency offices now cannot
5 even get anybody to talk to them about anything about the
6 trust. Your Honor, if the trustee did this, it would be clear
7 repudiation that would require receivership, but these are the
8 trustee delegates. They cannot, as a matter of law, repudiate
9 the trust. What we have here, Your Honor, is further
10 deception, the dishonest approach to how this Court's orders
11 have been written and entered. Everyone knows precisely why
12 that's the case. Even tribal checks have been withheld, and
13 Your Honor, I don't know how anybody in this litigation can
14 construe the tribal matters as being within the scope of this
15 case. Nevertheless, that's going on too.

16 We even have a situation where a matter has been in
17 litigation for nearly 40 years where an order has finally been
18 entered for distribution of per capita judgment funds to a
19 tribe which would ultimately result in further distributions
20 to individuals. That has also been held up, Your Honor. Your
21 Honor, I think we need to make it extremely clear that any
22 further effort to harm our clients, to cause further
23 disruption or dissension in Indian country because of what
24 this Court is trying to do to protect the trust beneficiaries,
25 will be addressed severely.

1 We cannot afford to see our clients, who are afraid
2 to do anything now to protect their interests, get further
3 harmed. This case has gone on for eight years. Witnesses are
4 intimidated and retaliated against. Special trustees have
5 been forced out of office because they disagree. Others have
6 been demoted and placed on administrative leave. Your Honor,
7 this has got to stop.

8 We also believe it's important that, to the extent
9 that we can exclude individuals who knowingly understand that
10 they are selling their property and have negotiated those
11 sales and are they're just pending, including members of the
12 Agra Cullenty (ph. sp.) tribe, including people in Oklahoma
13 that we should be able to expedite those transactions and not
14 further hamper those transactions. There are individuals who
15 are in that position, and we should be able to do that very
16 quickly. We should make sure the tribes are not adversely
17 affected by this because they're not implicated in this case.
18 We should make sure that particular situation that I mentioned
19 that has been in litigation 40 years is no longer a problem in
20 this case.

21 Your Honor, we don't know when or how the government
22 will begin to discharge its trustees, but they can't allowed
23 to do this. I would also suggest, and as much as we have
24 Donna Erwin scheduled to appear for deposition on the 14th of
25 this month, that we are permitted to explore issues with

1 regard to the issuance of her 9/30/2004 memorandum which
2 states specifically, "We will hold per capita payments."

3 Your Honor, we think there's bad faith here, further
4 bad faith. We believe it's palpable. We believe it's
5 important to get to the bottom of this because it's clear that
6 the only reason this is occurring is not because of a
7 reasonable misunderstanding of what this Court was trying to
8 do. It's a willful attempt to undermine the integrity of this
9 litigation, and a willful attempt to harm our clients.

10 THE COURT: All right. Has Secretary Norton decided
11 to declare war on the Indians that brought this case? What's
12 going on here?

13 MS. SPOONER: The checks are not being withheld,
14 Your Honor, and I believe --

15 THE COURT: This evidence is that they are. Why did
16 anybody even talk about withholding checks? That's
17 preposterous. I had no discussion whatsoever in either the
18 2002 opinion or the opinion this week about holding up checks.
19 The very thought that the Secretary and her delegates would do
20 that is just beyond my comprehension.

21 MS. SPOONER: Your Honor, the Secretary and her
22 delegates are not doing that, and Mr. Gingold knows very well
23 that the document that he has provided to the Court is only
24 one page in a chain of e-mails in which personnel within the
25 Office of Trustee are discussing the possible meanings of Your

1 Honor's order and indicating that attorneys --

2 THE COURT: Why would that thought cross their
3 minds, that I would have ordered checks withheld?

4 MS. SPOONER: That's because, Your Honor, there is a
5 paragraph in the Court's order which we assume the Court must
6 have meant to be limited to the sales of trust land but in
7 fact is not so limited. And that, Your Honor, is one of the
8 reasons why we appreciate granting our request --

9 THE COURT: Let me ask you this: In my 2002 order I
10 said, "This order does not prohibit defendants from
11 communicating with class members in the ordinary course of
12 business on routine matters unrelated to the instant
13 litigation." That's on page 19.

14 And on page 19 of the opinion that I entered this
15 week, I said, "The Court allowed regular sorts of business
16 communications with class members that occur in the ordinary
17 course of business to continue because they do not purport to
18 extinguish the rights of class members in this litigation."

19 So how could I have been more -- and in the hearing
20 when Mr. Quinn appeared before me, I talked about that very
21 thing. How could I be more clear, that I have allowed all
22 these regular, routine communications to continue as long as
23 we're not extinguishing rights?

24 How could that be more clear, and why isn't this
25 just a deliberate attempt to misinterpret my order in order to

1 injure the plaintiffs? It comes across as absolute direct
2 retaliation.

3 MS. SPOONER: It is not, Your Honor.

4 THE COURT: Why not?

5 MS. SPOONER: It is not because the current order
6 that the Court issued just two days ago contains a paragraph
7 that says there shall be no communications without limitation
8 to subject matter --

9 THE COURT: That whole order is a supplement
10 regarding sale and exchange of land --

11 MS. SPOONER: That, Your Honor, is --

12 THE COURT: -- to the 2002 order, and that is
13 crystal clear. If you didn't understand that, you should come
14 back to me. Okay, you did. But in the meantime, you sent out
15 misleading communications to everybody in the world.

16 MS. SPOONER: Which communications are misleading,
17 Your Honor?

18 THE COURT: The ones that you attached that you
19 filed this morning, adding in all these items 2 through 8 that
20 have never been discussed with me. You've told everyone in
21 the world they can't talk to any Indian about those. You
22 never even talked to me about that.

23 MS. SPOONER: Your Honor, we feared --

24 THE COURT: You never even raised it with me.

25 MS. SPOONER: Your Honor, we feared that if we did

1 not make an attempt to implement your order as quickly as
2 possible, and at the same --

3 THE COURT: That is preposterous. You know that I
4 have given you an immediate hearing any time you've asked for
5 it, and I gave you an immediate hearing within hours of when
6 you asked for it today. So to send out something like that to
7 everybody in the world, it's preposterous.

8 MS. SPOONER: So, Your Honor, is the Court telling
9 us now that this order, with the exception of the Ft. Peck and
10 Quapaw portions of it, is to limit only communications dealing
11 with the sale of land?

12 THE COURT: With the -- your paragraph 1.
13 Paragraphs 2 through 8 I have not mentioned. Now, paragraphs
14 2 or 8 might be fertile discussion for what you're doing in
15 those, but I don't know what you're doing in those. I learned
16 what you're doing on land sales through this motion they
17 filed. If you want to move to clarify and see whether you
18 should be doing all these other things, you can do it. I
19 assumed you'd been doing them all since 2002.

20 MS. SPOONER: Paragraph 4, Your Honor --

21 THE COURT: So to stop them and stay that it's
22 because of my order is a flat-out lie.

23 MS. SPOONER: Your Honor, your initial --

24 THE COURT: A lie.

25 MS. SPOONER: Your Honor, your initial order

1 contained an exception for ordinary course of business.

2 THE COURT: Yes.

3 MS. SPOONER: And in doing that in your opinion, you
4 explained that ordinary course of business is the sort of
5 activity that would go on between the Department of the
6 Interior and American Indians even if this suit did not
7 happen.

8 THE COURT: Right.

9 MS. SPOONER: And, therefore, the government
10 reasonably believed that land sales which have been going on
11 for decades under a regulation that has been in existence for
12 decades were the regular and ordinary course of business.
13 Your Honor ruled two days ago that that was not the case, that
14 the sale of land --

15 THE COURT: You were extinguishing rights. That's
16 what I talked about in the 2002 order. You're extinguish all
17 rights when you sell the whole corpus of it. That's what you
18 were doing in the land sales. You're extinguishing rights.

19 MS. SPOONER: Your Honor, as we explained to the
20 Court in our argument on the plaintiffs' motion for a
21 temporary restraining order, we are not affecting any rights
22 that these --

23 THE COURT: I know that's your argument, and you can
24 tell it to the Court of Appeals now because I've ruled on that
25 question.

1 MS. SPOONER: The plaintiffs' argument was that we,
2 the government, was contending that once a land sale occurred
3 or an IIM account was closed, that they had no rights in this
4 litigation, and as we pointed out, that was not what the
5 Court's class definition said because it includes former as
6 well as current account holders.

7 The reason, Your Honor, that we have asked for a
8 hearing today is to bring up some of the problems and
9 difficulties that we hope we can resolve with Your Honor about
10 the language within the Court's order. The first ordered
11 paragraph of the Court's order does discuss specifically land
12 sales. When you go to the fourth order, however, it goes on
13 to say that, "At henceforth, communications between interior,"
14 and I'm leaving out some of the additional language, "and
15 members of the plaintiffs' class may proceed only if the
16 Court-approved version of the above-described notice is
17 conspicuously displayed on the communications, and then, only
18 between interior defendants, their agents, representatives,
19 officers and so forth."

20 This paragraph is not limited, Your Honor, to land
21 sales. We believe that that is what the Court intended, but
22 we did not feel at liberty yesterday, when we needed to advise
23 interior employees of their obligation under this order, to
24 assume that that's what the Court meant when that is not what
25 the order said specifically.

1 THE COURT: And you didn't think I would give you a
2 prompt hearing to say that's what it meant?

3 MS. SPOONER: We thought you would, Your Honor;
4 however --

5 THE COURT: Then why didn't you ask for one?

6 MS. SPOONER: We worked all day yesterday trying to
7 arrive at a definition that we thought would dislocate the
8 Native Americans as little as possible, but at the same --

9 THE COURT: Oh, that's preposterous.

10 MS. SPOONER: It is not, Your Honor.

11 THE COURT: When you told everybody to stop all
12 checks?

13 MS. SPOONER: We did not tell everyone to stop all
14 checks.

15 THE COURT: That's what this says.

16 MS. SPOONER: But I'm telling you --

17 THE COURT: You're saying it didn't go out?

18 MS. SPOONER: It did not happen, Your Honor.

19 THE COURT: It went out. The order went out.

20 MS. SPOONER: Which order?

21 THE COURT: The Swimmer order that he gave me
22 yesterday [].

23 MS. SPOONER: No, it is not an order, Your Honor. It
24 is one page out of a series of pages of e-mails that is a
25 discussion between --

1 THE COURT: Have any checks been held up?

2 MS. SPOONER: Not that I know of, Your Honor.

3 THE COURT: What does that mean, "Not that I know
4 of"?

5 MS. SPOONER: That means I have inquired. I have
6 met with the Secretary of the Interior. She has decided that
7 checks will not be delayed. There is no indication that
8 checks are being held up.

9 I will tell Your Honor about one situation about
10 which the Justice Department advised plaintiffs' counsel, and
11 that is the situation about a District Court case in South
12 Dakota where the Assistant U.S. Attorney has contacted me
13 because she has heard about this order and wants to make sure
14 that she can make a distribution, not so different by the way
15 from what will happen in the Ft. Peck case, to individuals who
16 may be class members. That obviously raised an alert in my
17 mind.

18 We had discussions with the Assistant U.S. Attorney.
19 We tried to learn more about the case, and I told her that I
20 would come to court today and advise Your Honor of the
21 situation involved there so that if you think it is more like
22 the Ft. Peck case and that the mailings need to be held up
23 until we have a statement, we can do that. Or if you think it
24 is not like the Ft. Peck case and we can go ahead, I can tell
25 the Assistant United States Attorney that those checks can go

1 out when they're prepared.

2 Would you like to hear, Your Honor --

3 THE COURT: If it's a question of sending checks,
4 I'm not stopping any sending of any checks and I never have.

5 MS. SPOONER: Would that be true in the Ft. Peck
6 case as well?

7 THE COURT: Absolutely. I have never stopped
8 sending any checks, and I have never said stop sending checks.
9 It's Interior that does that and then blames it on the Court,
10 and tells people we can't do it because of the Court. It's
11 Interior that does that.

12 MS. SPOONER: Your Honor, I --

13 THE COURT: You don't think these people don't call
14 my Chambers and complain, too? They do. And I don't take
15 their calls. I tell them call class counsel or call you. But
16 I guarantee you I get just as many calls as anybody else --

17 MS. SPOONER: Thank you, Your Honor. Whenever we
18 receive --

19 THE COURT: -- about the checks not being sent and
20 everyone being told that it's because of the Court.

21 MS. SPOONER: Thank you, Your Honor. When we
22 receive telephone calls from class counsel, we also refer --
23 from class members, we also refer them to class counsel.

24 So let me be very clear, Your Honor. It is my
25 understanding --

1 THE COURT: What is the wording you want me to
2 change in the order?

3 MS. SPOONER: Well, for the problem that we've been
4 talking about right now, it should be made clear that the
5 fourth ordered paragraph applies only to -- and again, we use
6 the same language -- "the sale, exchange, transfer, or
7 conversion of Indian land."

8 THE COURT: All right. I'll do an order in the next
9 hour amending that. Then what excuse will there be for what
10 you're doing?

11 MS. SPOONER: Which is what, Your Honor?

12 THE COURT: Two through 8.

13 MS. SPOONER: Then, Your Honor, we can simply say
14 that it's only that, that it doesn't contain all
15 communications, such as is described in paragraph 4.

16 THE COURT: All right.

17 MS. SPOONER: And it would also be helpful, Your
18 Honor, if you would clarify that that paragraph 4 does not
19 apply to the provisions of Roman Numeral II which covers,
20 among other things, the Ft. Peck and Quapaw provisions. It's
21 in the same order, but it's not in the same section. But we
22 want to be clear that the provisions of the first section do
23 not apply to the provisions of the second section.

24 THE COURT: All right. I'll read that more
25 carefully and do something on that as well.

1 MS. SPOONER: Okay. And we assume, Your Honor, that
2 when you refer to things such as the sale of land, you are not
3 speaking about leases, even though they may --

4 THE COURT: Right.

5 MS. SPOONER: Is that correct?

6 THE COURT: Correct. The items 2 through 8, I think
7 the plaintiffs and you should be talking about them now that
8 they've been flagged. If there are other items there that the
9 plaintiffs think violate the 2002 order, one of you all ought
10 to get the issue before me.

11 MS. SPOONER: But in general --

12 THE COURT: I mean, I don't have any view of those
13 because I don't know how any of those work. I now understand
14 how the land sales work. I would like to be educated
15 similarly if there are any of these other items that I ought
16 to be doing something about.

17 MS. SPOONER: Okay. And also, with respect to oral
18 communications, as you probably know, Your Honor, much of the
19 service that's provided to trust beneficiaries results from
20 the individual Native Americans actually coming in to an
21 Indian agency.

22 THE COURT: Right, and that's what I talked about on
23 page 19 of both opinions.

24 MS. SPOONER: And we assume that your order applies
25 to that as well.

1 THE COURT: Absolutely. Absolutely.

2 MS. SPOONER: And we assume that it does not apply
3 to any natural resources other than land. For instance, it
4 doesn't apply to timber or the sale of mining rights or
5 anything like that?

6 THE COURT: I don't know. Is that in the definition
7 of part 152? I don't know.

8 MS. SPOONER: Well, you can, in fact, sell mining
9 rights under Section 152. That is, you can sell subsurface --

10 THE COURT: Right, but if it's a sale of the rights,
11 I would think it would apply. If it's a 152 sale, why
12 wouldn't it apply?

13 MS. SPOONER: Well, if it's a sale. I'm asking if
14 it's a lease.

15 THE COURT: Oh, a lease. I don't think any of 152
16 applies to leasing, of my order, because you're not
17 extinguishing any rights if you're leasing.

18 MS. SPOONER: Okay. And we assume, Your Honor, as
19 we read the Court's order, that it is intended to apply to all
20 the statutory sales under the Indian Land Consolidation Act?

21 THE COURT: Search me. I don't know what you're
22 talking about.

23 MS. SPOONER: The Indian Land Consolidation Act,
24 Your Honor, is essentially the sale of land of highly
25 fractionated interests so that they can be conveyed to the

1 tribe. One of the things that Mr. Gingold is concerned about
2 is the potential impact of this order on the tribes.

3 The tribes, and I cannot, of course, speak for them
4 as their counsel, but it is my understanding that the Indian
5 Land Consolidation Act is a great benefit to the tribes
6 because they are able to obtain highly fractionated land and
7 eventually reincorporate that into the reservation.

8 THE COURT: Okay. And what was your question?

9 MS. SPOONER: Whether the sales that the Court
10 intends to -- it conclude -- are unauthorized contacts with
11 represented parties, would include sales under the Indian Land
12 Consolidation Act which was passed by Congress and funded by
13 Congress as a means of eliminating highly fractionated lands
14 and getting those lands back in the hands of the tribes.

15 THE COURT: But it's a sale by the individual
16 Indian?

17 MS. SPOONER: Yes, ultimately to the tribe.

18 THE COURT: I don't see why that would be treated
19 differently than any other sale.

20 MS. SPOONER: So it's covered by --

21 THE COURT: Right.

22 MS. SPOONER: -- the statute. Your Honor, there's
23 also --

24 THE COURT: I mean, if the plaintiffs and you come
25 to some agreement otherwise, I can understand how there might

1 be a different view, but on the face of it, if it's a sale of
2 land that reduces the corpus, that's what I thought we ought
3 to be giving the Indians some rights to have the information
4 about before they sell their land and get rid of their corpus.

5 MS. SPOONER: The individual corpus as opposed to
6 the tribe?

7 THE COURT: Right.

8 MS. SPOONER: I asked that, Your Honor, in view of
9 Mr. Gingold's concern about the tribes because I'm hearing
10 from the tribes, and from others who represent the tribes,
11 that this is of great concern to them because the Indian Land
12 Consolidation Act does result in the land coming back into the
13 tribe, and I just wanted to clarify that.

14 THE COURT: Right.

15 MS. SPOONER: There's also some confusion, Your
16 Honor, as to whether in a sale that has already essentially
17 been effected, if Interior can continue to receive payments
18 that ultimately would result in the full conveyance of the
19 land. In other words, the conveyance --

20 THE COURT: I haven't stopped any of that.

21 MS. SPOONER: Okay. Thank you, Your Honor.

22 In addition, as you know, Your Honor, from having
23 heard many, many arguments in this case, that much of the work
24 that is done by interior has been contracted or compacted to
25 what we call generically -- it may not be entirely accurate --

1 THE COURT: Right, but they're acting as agents for
2 Interior.

3 MS. SPOONER: They are, Your Honor, and the question
4 is whether your order prevents them from speaking to their own
5 tribal members -- at the tribes from speaking --

6 THE COURT: If they're acting as an agent of
7 Interior, it does.

8 MS. SPOONER: For any of the sale of the land, okay.

9 THE COURT: Right.

10 MS. SPOONER: Okay. I have to confess, Your Honor,
11 that we had understood the Court to have eliminated the
12 ordinary course of business exception.

13 THE COURT: No. No, no, no.

14 MS. SPOONER: But that still applies?

15 THE COURT: That's why I repeated it in page 19 of
16 this opinion.

17 MS. SPOONER: Okay. So there still is an ordinary
18 course of business exception.

19 THE COURT: Sure.

20 MS. SPOONER: It's just that it --

21 THE COURT: Oral discussion, sure. Well, it's more
22 than oral. I said ordinary -- I think in 19 of the original I
23 just said course of business as long as rights weren't
24 extinguished.

25 MS. SPOONER: That's correct, Your Honor. It was in

1 the original order, but given the second order especially --

2 THE COURT: All I did was supplement the original
3 order. I didn't rescind it or amend it; I just supplemented
4 it. So the original order is still the same. I just
5 supplemented it dealing with these land sale things. That's
6 why I called it a supplement.

7 MS. SPOONER: So the ordinary course of business
8 exception applies unless the ordinary course of business --

9 THE COURT: Extinguishes rights or involves these
10 land sales. I've now supplemented it for the land sales.
11 Okay.

12 MS. SPOONER: Actually, Your Honor, in your order of
13 2 days ago in footnote 5, this has led to some of our
14 confusion. You indicate that it is --

15 THE COURT: What page is that?

16 MS. SPOONER: It's page 22, Your Honor.

17 THE COURT: Okay.

18 MS. SPOONER: On the last sentence of that, you
19 indicate that it is not relevant whether the sale of trust
20 land extinguishes class members' rights. It's the fact that
21 the --

22 THE COURT: Well, I didn't mean to say the oral
23 communications relates to the extinguishing rights. What the
24 2002 order says, "In the ordinary course of business on
25 routine matters unrelated to the instant litigation." I don't

1 think sale of the corpus could be considered unrelated to the
2 instant litigation, ever.

3 MS. SPOONER: Well, I think what your initial order
4 said, as I recall it, and I don't have it in front of me, was
5 that things that are permitted are the things that would have
6 occurred even if the litigation hadn't happened. And --

7 THE COURT: Well, that's not what I actually said.
8 What I actually said is what I just read you because I do have
9 the order before me, and I did not modify that order. All I
10 did was supplement that order in this week's order.

11 MS. SPOONER: So the ordinary course of business
12 exception remains; it is simply that it can't --

13 THE COURT: Routine matters unrelated to the instant
14 litigation.

15 MS. SPOONER: And it can't extinguish the rights of
16 IIM beneficiaries to, what, their land?

17 THE COURT: Any rights.

18 MS. SPOONER: Any rights. Your Honor, that's
19 difficult because you have indicated that leases are not
20 applicable.

21 THE COURT: They're not extinguishing any rights on
22 leases, are they?

23 MS. SPOONER: Well, you extinguish the right to go
24 onto property that you've leased to someone else. I mean,
25 there are instances where certain rights are extinguished but

1 they won't be the rights to the land. The only concern here
2 is in the land itself, the title to the land.

3 THE COURT: That's all I purported to rule on in
4 this supplement to the 2002 order, and I have assumed, since
5 this is the first time anything has arisen since the 2002
6 order, that everybody has been happy with how things have been
7 working until we got into this problem about land sales. I
8 haven't assumed that I ruled on anything this week beyond land
9 sales. If there are now, because of your 2 through 8, other
10 questions that are raised by the 2002 order that need to be
11 addressed, I am ready, able, and willing to address them. I'd
12 prefer to do it with written briefs first as we did with the
13 land sales because I understood -- by the time I got to the
14 end of that, I understood what I was doing on land sales. You
15 all can agree or disagree, and if you don't, the Court of
16 Appeals is ready and waiting.

17 MS. SPOONER: Thank you, Your Honor.

18 And I think I have covered the fact that installment
19 sales themselves are not covered. Once the agreement is made
20 and the installment payments are being made, there's no need
21 to halt those.

22 THE COURT: Right.

23 MS. SPOONER: And the same would be true of mortgage
24 transactions.

25 THE COURT: Right.

1 MS. SPOONER: May I have just a moment, Your Honor?

2 THE COURT: Yes.

3 (Brief pause in proceedings).

4 MS. SPOONER: Two very small matters, Your Honor.

5 Thank you very your forbearance. And I apologize, because I'm

6 confident I'm repeating myself, but I'm not sure I understood.

7 Your Honor said that oral communications are definitely

8 prohibited under your order, or they are not prohibited?

9 THE COURT: They're not.

10 MS. SPOONER: They're not.

11 THE COURT: If they're the routine kind of

12 communications that's contemplative of the 2002 order, that

13 don't directly affect the extinguishing rights and things that

14 I was addressing in the 2002 order, I don't have any problem

15 with oral communications.

16 MS. SPOONER: But if, for instance, a beneficiary

17 came to the counter at an agency and asked for applications

18 because they want to sell their land, we should not discuss

19 that?

20 THE COURT: Well, that's getting closer to the line.

21 I guess I would see what position the plaintiffs take before I

22 give you a direct answer to that.

23 MS. SPOONER: Because, you know, one of the really

24 difficulties is, the people in the field. It's very hard, you

25 know, to make sure that we enter very clear instructions, and

1 it's hard to cover every situation.

2 THE COURT: I understand.

3 MS. SPOONER: The relationship, as I understand it,
4 between the Native Americans who rely on the agency office is
5 a very collegial one. They're in and out of the office with
6 some regularity because the agency offices are close. And
7 typically --

8 THE COURT: Well, that kind of oral communication, I
9 would think, is just the ordinary course of business. I have
10 never tried to do anything about the ordinary course of
11 business like that.

12 MS. SPOONER: Except that some of those discussions
13 are bound to be about, you know, asking for the form to apply
14 for --

15 THE COURT: Well, again, those are oral discussions.
16 Maybe we ought to talk about whether there should be some
17 clarification about oral discussions.

18 MS. SPOONER: All right. Thank you, Your Honor.

19 THE COURT: And maybe that's one that maybe we ought
20 to -- but that takes clarification of 2002 order, right?

21 MS. SPOONER: Yes, Your Honor, it does.

22 THE COURT: So maybe that's something that we ought
23 to let be briefed.

24 MS. SPOONER: And we're assuming, Your Honor, that
25 probate, to the extent it affects a transfer of land, is not

1 affected by your order?

2 THE COURT: I didn't think so --

3 MS. SPOONER: Okay. Thank you.

4 THE COURT: -- until I saw your item 3, or whatever
5 it is, today.

6 MS. SPOONER: Your Honor, I apologize, but that is
7 why we are here today, to try to --

8 THE COURT: I understand.

9 MS. SPOONER: -- make sure that we --

10 THE COURT: I understand.

11 MS. SPOONER: And, finally, as you know, we are due
12 today, pursuant to the Court's orders in the Court of Federal
13 Claims, to send notices to the plaintiffs in the Ft. Peck
14 case, and we understand that the plaintiffs in this case and
15 the plaintiffs in the Ft. Peck case have been working on some
16 language, and we would be glad to take a look at that to try
17 to facilitate that mailing, if at all possible.

18 THE COURT: Okay. Now, I had one other item I
19 wanted to give you an opportunity to address because I think
20 the most bitterly disappointing thing to me about this episode
21 is what Mr. Gingold filed last night from Mr. Swimmer.

22 It seems to me that, despite the actions of the
23 Secretary and the Assistant Secretary for Indian Affairs, I
24 will tell you candidly I thought until now that the Special
25 Trustee has always been initially on the side of the Indians.

1 Sometimes the Special Trustee got overruled internally and got
2 forced out, as happened with Mr. Homan and, I guess, Mr.
3 Slonaker, but the Special Trustee, it always seemed to me, was
4 trying to do the right thing for the Indians. And this memo
5 from Mr. Swimmer yesterday that I got last night was very
6 troublesome, that he would have the mindset that he thought
7 all checks could be stopped because of my order. There's
8 something wrong with that thought process that he even thought
9 that. He's not looking out for the Indians when he's thinking
10 like that.

11 MS. SPOONER: Your Honor, I assure you, having
12 worked with Mr. Swimmer in connection with this litigation,
13 that he does. The submission that Mr. Gingold made to you
14 could not have been more deceptive because it was incomplete.
15 What it was was an exchange of e-mails within the staff of OST
16 while they're awaiting advice from attorneys within the
17 Department of the Interior and the Department of Justice as to
18 the meaning of your order, and I think if nothing else this
19 hearing shows that there are some legitimate questions as to
20 what's permitted and what isn't permitted by your order, and
21 we did, government officials, many of us, worked as hard as we
22 could yesterday, into the night, in an attempt to come to some
23 sort of balancing so as to be very careful not to violate your
24 order, if indeed you did mean that paragraph No. 4 be as broad
25 as it is written, but at the same time, to continue on with as

1 much of the responsibilities of the Department of the Interior
2 as at all possible, and to immediately, upon concluding our
3 meetings, to file a notice to ask the Court to hear us.

4 Mr. Swimmer's e-mails, for which you have only a
5 portion, were merely discussions with his staff as to the
6 possible meanings, and they clearly say that they are awaiting
7 legal guidelines and that they expect to get it sometime in
8 the afternoon of yesterday.

9 THE COURT: So that was not communicated out to the
10 field?

11 MS. SPOONER: No. Not that I know of, Your Honor.
12 To our knowledge, it was just internal with OST. What has
13 been communicated out into the field is what is attached to
14 our notice.

15 THE COURT: Now, what about Donna Erwin's thing that
16 he just gave me?

17 MS. SPOONER: That's part of that chain of e-mails,
18 Your Honor, only a small part. Again, it is deceptive because
19 it is not -- it is absolutely not a direction that that is
20 what OST is going to do. Those checks have not been stopped.
21 The Secretary of Interior has decided they will not be
22 stopped. And any --

23 THE COURT: This memo he handed up to me is not an
24 order to stop sending the checks even though it says "we will
25 hold all the checks"?

1 MS. SPOONER: To my knowledge, it is not. It is
2 part of a chain of e-mails in which she is positing possible
3 interpretations of the orders, and I can tell you, Your Honor,
4 that I was in the office of the Interior yesterday when the
5 Secretary determined that under no circumstances would your
6 order stop the payment of checks in the ordinary course.

7 THE COURT: Okay. Thank you, Ms. Spooner.

8 MS. SPOONER: Thank you, Your Honor.

9 MR. GINGOLD: Your Honor, the only thing we have is
10 what we've given you. If there is a chain, we'd like to see
11 that. It would be very interesting to take an independent
12 view of what has been done because the only documents we have
13 is what we provided to you. So, again, maybe it's something
14 we could ask Ms. Erwin about during her depositions.

15 I'd like to point out that it's absolutely not true
16 that --

17 THE COURT: No, I'm not going to expend the Erwin
18 deposition to this. Let's get her deposition done on the
19 original point of the deposition, and then we'll worry about
20 other issues later. I don't want to get beyond where we are
21 with the Court of Appeals. Give them an opportunity to rule
22 on the structural injunction before we get to any of these
23 nonpreservation type issues, I think.

24 MS. SPOONER: Yes, Your Honor.

25 I also would like to point out that it is absolutely

1 not true that distributions haven't been held up. They have
2 been, and let me provide you with a copy of a letter we
3 received from counsel for three tribes this morning dealing
4 with the issue that Ms. Spooner mentioned she informed counsel
5 about at three o'clock this afternoon. Mr. Harper had
6 discussions long before that, as you'll see from this letter.

7 Your Honor, this has to do with the matter I
8 mentioned earlier with regard to litigation that's been
9 ongoing for nearly 40 years. I'd like to turn to page 2 of
10 this letter, which is signed by Bertram E. Hirsch on behalf of
11 three tribes, Sisseton-Wahpeton -- I can't pronounce this
12 properly -- Oyate of South Dakota, Spirit Lake Tribe of North
13 Dakota, and Sisseton-Wahpeton Sioux Council.

14 Your Honor, on page 2, second paragraph, states, "As
15 a consequence," and this talks about the distributions that
16 were to be made pursuant to this litigation on an order
17 entered by the Court with jurisdiction.

18 It says, "As a consequence, the government, until
19 the Cobell order disrupted this plan, was prepared to zero out
20 the judgment fund this week by making per capita payments to
21 7,116 lineal descendants and by paying the three tribes. The
22 government believes the Cobell order may bar these payments."

23 Your Honor, this is what we received this morning.
24 To the extent that the Secretary made a decision yesterday, it
25 apparently wasn't conveyed to the Justice Department or the

1 Interior Department, and it goes further, Your Honor, next
2 paragraph:

3 "As far as I can determine, none of the matters at
4 issue in Cobell apply to the Sisseton-Wahpeton judgment fund,"
5 and, Your Honor, that's correct. None of the monies in this
6 fund have ever been an IIM account, although it's likely there
7 are Sisseton-Wahpeton lineal descendants who have IIM
8 accounts, and it goes on.

9 Your Honor, this is exactly one of the things we
10 were talking about. In fact, distributions were upheld, so it
11 is absolutely not true to say they were not, and to the extent
12 the Secretary's unable to communicate her decisions, it is
13 critical that the trustee delegate find a way to do that so
14 further disruption doesn't occur, Your Honor.

15 Your Honor, we thank you very much for the time
16 you've provided us. Our clients are extremely grateful for
17 the relief you're providing. We believe it is essential that
18 we have expedited procedures to allow those who knowingly want
19 to sell their lands that they be able to do so.

20 It is highly unlikely, as this Court, I'm sure,
21 understands, that plaintiffs and defendants will ever agree on
22 any language. So, therefore, any period of time that this
23 Court gives plaintiffs and defendants to deal with each other
24 is probably not going to be particularly fruitful.

25 And, Your Honor, we would suggest -- one other

1 point. The issue with regard to Ft. Peck has nothing to do
2 with the issue that I just mentioned with regard to the
3 distribution in the matter that has been involved in
4 litigation for 40 years. Ft. Peck was an IMPL issue. It was
5 an accounting issue. This matter I raised with you is not an
6 accounting issue, Your Honor. So it is like comparing apples
7 and oranges.

8 Your Honor, would you entertain a process to
9 expedite the resolution of those individuals who have asked
10 that their lands be sold with the information they have? We
11 have received affidavits and requests. We would like to be
12 able to provide them to the Court so this Court can relieve
13 them of any further delays that exist and minimize whatever
14 disruptions occurring to ensure that --

15 THE COURT: I don't have any problem with expediting
16 anything.

17 MR. GINGOLD: Thank you very much, Your Honor.

18 THE COURT: Get their consent or nonconsent and file
19 it.

20 MR. GINGOLD: Well, their consent, they could just
21 withdraw it the next day anyway so it doesn't necessarily make
22 any difference.

23 THE COURT: Well, I'm talking about -- I can't act
24 without the position of both parties before me.

25 MR. GINGOLD: Okay, Your Honor.

1 THE COURT: I would think, then, to make sure we
2 stay on track, how about October 19 at 10 a.m, having a
3 further status about whether the 2 through 8 issues remain or
4 other issues remain that need to be resolved on this so we
5 have a time set to make sure these issues don't fall by the
6 way side? I don't understand the 2 through 8 issues and what
7 is presented there, but --

8 MS. SPOONER: That will be fine, Your Honor. May I
9 have one moment?

10 THE COURT: Yes. That would give us an opportunity
11 to be sure we're not losing track because I thought what I was
12 doing was supplementing the 2002 order to deal with land
13 sales. I didn't purport to do any more than that. I don't
14 understand 2 through 8 well enough to have been trying to do
15 anything regarding those.

16 MS. SPOONER: I understand that, Your Honor, and
17 we'd welcome the opportunity --

18 THE COURT: That's why I thought I was just
19 supplementing the 2002 order and dealing specifically with
20 land sales because I now understand them.

21 MS. SPOONER: That's correct, Your Honor. I do,
22 however, have to express our disappointment that plaintiffs
23 are unwilling to attempt to negotiate a statement that would
24 allow us to comply with the Federal Circuit's order today. We
25 understand that there has been something that's been agreed to

1 that --

2 THE COURT: Is that what he said?

3 MS. SPOONER: I thought he said that we shouldn't --

4 THE COURT: I thought he was talking about the
5 notice coming to me, that he didn't ever think they would
6 agree on the order.

7 MS. SPOONER: Well, I think we're talking about the
8 same notice, the notice that you've asked us to provide within
9 10 days?

10 THE COURT: No. He's saying no. Yes.

11 MS. SPOONER: That's the notice that would need to
12 accompany the Court of Federal Claims' mailing today.

13 THE COURT: I see.

14 MS. SPOONER: I could be wrong about that, but it
15 seems that if there's any way we could expedite that, we
16 should do that. And Your Honor, I assume the Court is aware
17 that the letter that Mr. Gingold just handed you is, in fact,
18 the matter that I raised with you earlier, to confirm on
19 behalf of the Justice Department that we are able to send
20 those checks out. Thank you very much.

21 THE COURT: Okay.

22 MR. GINGOLD: Mr. Harper will address the Court on
23 that, if Your Honor --

24 THE COURT: Yes.

25 MR. HARPER: Thank you, Your Honor.

1 We have been in contact with the Sonofsky, Chambers
2 law firm that represents the Fort Peck tribe as class counsel,
3 and we have agreement with them on language. It just requires
4 the government's agreement that those notices can go out at
5 any point in time.

6 THE COURT: Okay. So it can be presented to me if
7 the government agrees, and I can sign off on it?

8 MR. HARPER: That's correct. My understanding is
9 that they have already been forwarded, the information and the
10 language, that both Sonofsky Chambers as class counsel in the
11 Fort Peck case and the plaintiffs in this case have signed off
12 on.

13 MS. SPOONER: It's possible -- I think, Your Honor,
14 that I received copies of those just before I left for
15 chambers. I have not had a chance to review them, but would
16 be glad to do --

17 THE COURT: Okay. If you get them to me tonight,
18 I'll sign them tonight. I'm going to be here.

19 MS. SPOONER: I can tell you, Your Honor, in
20 advance, that I know one of the difficulties that we're going
21 to have, and I hope that it is not a difficulty that will
22 prevent us from complying with the Court of Federal Claims
23 and, that is, as you know, the plaintiffs and the defendants
24 have a very different view of, number one, the scope of the
25 class; number two, the nature of the case, and; number three,

1 the relief that's being requested.

2 In an earlier draft I saw a few days ago -- I think
3 it was prepared by counsel for Ft. Peck -- there was some
4 discussion about the plaintiffs insisting that their view of
5 the scope of the case and the scope of the class, and that
6 sort of thing, be included in this notice.

7 As Your Honor's well aware, we disagree with that.
8 Those issues are in front of the Court of Appeals as we speak.
9 We don't, however, want to hold up this notice.

10 THE COURT: Right.

11 MS. SPOONER: If the plaintiffs' counsel is
12 satisfied and the Court is satisfied, we would not object to
13 their going out so long as it is clearly understood that we
14 are not waiving in any way our positions regarding the nature
15 of --

16 THE COURT: Put that language in the order I have
17 approving the notice.

18 MS. SPOONER: Okay. As well as, Your Honor, we
19 anticipate, in view of the fact that the rest of the Court's
20 order that doesn't deal with Ft. Peck is far broader and
21 involves a more complicated set of facts, that we will want to
22 provide to you, within the 10 days you allowed, a notice that
23 may be different from or include more or less than what this
24 notice does, and we would like --

25 THE COURT: I understand that, and that's why in my

1 thing I only said "for example" so you all can talk about
2 needs to be in the notice. I wasn't trying to rule before I
3 got both of your suggestions about what should be in it.

4 MS. SPOONER: We just want to be sure on this record
5 that we are not waiving --

6 THE COURT: I agree. Put that in the proposed order
7 that you send over with the notice that I'm going to approve.

8 MS. SPOONER: Thank you very much, Your Honor.

9 THE COURT: The government does not, by sending this
10 notice, waive any rights or whatever, and I can put that in
11 the order.

12 MS. SPOONER: Thank you very much.

13 THE COURT: You can put it in the order and I'll
14 sign it.

15 MS. SPOONER: Thank you very much, Your Honor.

16 (Whereupon, the proceedings in the above-entitled matter
17 were adjourned at 3:47 p.m.)

18

19 CERTIFICATE OF REPORTER

20 I certify that the foregoing is a correct transcript
21 from the record of proceedings in the above-entitled matter.

22

23

Theresa M. Sorensen, CVR-CM
Official Court Reporter

24

25